



December 5, 2000

Ms. Lorna R. Jones
Assistant County Attorney
County of Harris
1019 Congress 15th Floor
Houston, Texas 77002-1700

OR2000-4604

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 141840.

The Harris County Hospital District (the "district") received a request for the following information:

1. All bylaws, medical staff rules, policies and procedures, accreditation requirements and similar documents pertaining, relating or referring to supervision of residents or countersigning of charts prepared by residents.
2. All policies and procedures, protocols or standing orders pertaining, relating or referring to any of the following:
 - a. diagnosing kidney stones;
 - b. diagnosing kidney malignancies;
 - c. diagnosing thrombocytopenia; and
 - d. clinical indications for the taking of the following blood studies: HGB, HCT or Platelet count.
3. All medical malpractice liability policies covering [two named individuals].

You have submitted for our review information responsive to items 1 and 2 above. You assert that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note at the outset that you have not submitted for our review any of the information responsive to item 3 above. Among other requirements, a governmental body must submit to this office no later than the fifteenth business day after the date of receiving the written request a copy of the specific information requested, or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(D). If a governmental body fails to request a decision of this office as provided by section 552.301, the requested information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302. Section 552.103 of the Act is a discretionary exception that, even if applicable, does not provide a compelling reason to withhold information from the public.¹ The information responsive to item 3 above may not therefore be withheld from the requestor pursuant to section 552.103 of the Act. Because the district has not demonstrated a compelling reason under section 552.302 to withhold from the requestor the information responsive to item 3 above, we conclude that this information must be released to the requestor.

Section 552.103 excepts from disclosure information:

relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general).

exception is applicable, the district must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also* *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). You assert that litigation involving the district was reasonably anticipated at the time of the request. To demonstrate that litigation is reasonably anticipated, the district must furnish evidence that, at the time of the request, litigation was realistically contemplated and was more than mere conjecture. Gov't Code § 552.103(c); Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). This office has found that where a governmental body receives a demand letter from an attorney which threatens suit, litigation may be reasonably anticipated for purposes of section 552.103. Open Records Decision No. 346 at 2 (1982). We believe in this instance that the district has demonstrated that litigation was reasonably anticipated at the time of the request. As to the second prong of the above-stated test, upon careful review of the submitted information, we also agree that the requested information relates to the anticipated litigation. Except as otherwise noted herein, the department may therefore withhold the remaining requested information pursuant to section 552.103 of the Act.

Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent the opposing parties in the pending or anticipated litigation have seen or had access to any of the information responsive to the request, there is no justification for withholding that information from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Finally, we note that the submitted bylaws are indicated to have been adopted by the district medical staff, then approved by the Board of Managers of the district, which approval we assume occurred in an open session. It is therefore possible that this information has previously been voluntarily released to one or more members of the public. Section 552.007 of the Act prohibits the selective public disclosure of information by a governmental body. *See* Gov't Code § 552.007. Thus, if the bylaws or any of the other information responsive to the request has previously been voluntarily made available to any member of the public, the district may not now withhold this information under section 552.103.

In summary, the information responsive to item 3 of the request must be released to the requestor in its entirety pursuant to section 552.302. The remaining information may be withheld under section 552.103, as provided above, so long as this information has not previously been made available to the public.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

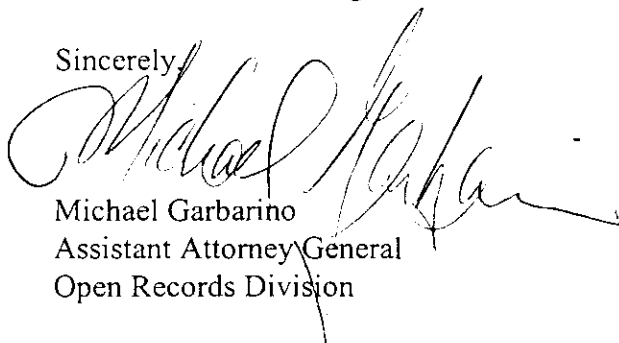
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael Garbarino".

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 141840

Encl. Submitted documents

cc: Mr. John M. Padilla
2800 Post Oak Boulevard, Suite 6300
Houston, Texas 77056
(w/o enclosures)